APPEAL NO. 033135
FILED JANUARY 20, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on October 27, 2003. The hearing officer determined that: (1) the respondent (claimant) sustained a compensable repetitive trauma injury with a date of injury of _____; (2) the appellant (carrier) is not relieved from liability under Section 409.002, because the claimant timely notified her employer of an injury pursuant to Section 409.001; (3) the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy and short-term disability policy; and (4) the claimant has had disability from November 24, 2002, continuing through the date of the hearing. The carrier appeals these determinations essentially on sufficiency of the evidence grounds. The carrier also asserts that the hearing officer erred, as a matter of law, with regard to election of remedies. The claimant urges affirmance.

DECISION

Affirmed.

The hearing officer did not err in making the complained-of injury, notice, and disability determinations. The determinations involved questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's injury, notice, and disability determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

With regard to election of remedies, the hearing officer determined, "[e]lection of remedies is no longer a viable defense to a claim for workers' compensation benefits under the 1989 [Act]," relying upon our earlier decisions which applied Valley Forge Insurance Company v. Austin, 65 S.W.3d 371 (Tex. App.-Dallas 2001, pet. denied). However, in Texas Workers' Compensation Commission Appeal No. 030473, decided April 15, 2003, we observed:

> [T]he Texas Supreme Court in a per curiam opinion denied the petition for review of the court of appeals decision in Valley Forge and agreed with the court of appeals conclusion that Austin's claim for workers' compensation benefits is not barred by the election-of-remedies doctrine, but noted that the court of appeals did not need to reach its holding that Section 409.009 abrogated the election-of-remedies doctrine where group

> health insurance is also involved….Thus, the Texas Supreme Court stated that it did not reach the merits of the court of appeals' holding and left open the question of whether Section 409.009 abrogates the election-of-remedies doctrine.

Whether the claimant made an election of remedies presented a question of fact for the hearing officer to resolve. *See* Id. In the Statement of the Evidence, the hearing officer stated:

> Claimant testified that she notified her supervisor…of her diagnosis and that her condition was related to her employment on _____, after her doctor's appointment on that date. Claimant testified that she also inquired about workers' compensation benefits on that date; and she was informed by [her supervisor] that the employer did not subscribe to workers' compensation insurance. Based on the information she received from [her supervisor], Claimant used her group health insurance to obtain medical treatment for her carpal tunnel syndrome.

Clearly, the hearing officer believed that the claimant did not make an informed election to receive group health insurance benefits, and presumably short-term disability benefits, in lieu of workers' compensation benefits. In view of the evidence presented, we cannot conclude that this determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Accordingly, we affirm the hearing officer's election-of-remedies determination.

The decision and order of the hearing officer is affirmed.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Edward Vilano
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Margaret L. Turner
Appeals Judge